



DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

Docket No. USCG-2021-0301

RIN 1625-AA09

Drawbridge Operation Regulation; Three Mile Creek, Mobile, Alabama

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the operating schedule that governs the CSX Transportation drawbridge across Three Mile Creek, mile 0.0, Mobile, Mobile County, Alabama. This proposed modification will require the bridge to remain open to navigation for three 75 minute periods each day. We invite your comments on this proposed rulemaking.

DATES: Comments and relate material must reach the Coast Guard on or before [INSERT DATE **60** DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by docket number USCG 2021-0301 using Federal Decision Making Portal at <https://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Doug Blakemore, Eighth Coast Guard District Bridge Branch at (504) 671-2128 or Douglas.A.Blakemore@uscg.mil

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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| CFR | Code of Federal Regulations |
| DHS | Department of Homeland Security |
| FR | <i>Federal Register</i> |
| OMB | Office of Management and Budget |
| NPRM | Notice of Proposed Rulemaking (Advance, Supplemental) |
| § | Section |
| U.S.C. | United States Code |

II. Background, Purpose and Legal Basis

CSX Transportation has requested to change the operating schedule of their drawbridge across Three Mile Creek, mile 0.0, Mobile, Mobile County, Alabama. This bridge is regulated under 33 CFR 117.5 and opens on signal. It has a vertical clearance of 10' in the closed to vessel position and is unlimited in the open to vessel position. Navigation on this creek consists of tows and barges and small industrial vessels. On June 1, 2021 at the request of CSX, the Coast Guard issued a temporary deviation to the regulations titled "Drawbridge Operation Regulation; Three Mile Creek, AL" (86 FR 29204). There, we stated that the 60-day deviation would test a temporary change to the operating schedule of the CSX drawbridge bridge to determine whether a permanent change is necessary. From June 1 through August 2, 2021 this deviation opened the bridge from 6:30 a.m. – 7:30 a.m., 2:30 p.m. – 3:30 p.m. and 10:30 p.m. – 11:30 p.m. to allow vessels to schedule their trips through Three Mile Creek and opened at all other times on signal. During the comment period that closed on August 3, 2021, eight comments were received.

Two commenters stated that the proposal would put maritime companies at an unfair economic disadvantage in moving commerce compared to rail transportation. Neither commenter provided data or economic information. The decision to change or create a drawbridge regulation rests primarily upon the effect of the proposed change on navigation and a vessels reasonable ability to use the waterway and to assure that the

change provides for the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment.

Two commenters stated that the temporary operating schedule would create unsafe navigation conditions. Large vessel queues would be built up waiting for the bridge to open. When the bridge opens these vessels would attempt to pass through the bridge at the same time. During the test deviation the bridge opened about 4 times per day. There were no indications or reports that unsafe navigation conditions were created during the 60 day test period.

One commenter stated that the language used in this temporary regulation change should be changed to remove the term “if there are no trains on the bridge.” This phrase has been removed from the proposed rule.

One commenter stated that a commerce clause should be placed in this bridge’s regulation to allow free navigation. They cited a U. S. Supreme Court ruling from 1865, “Gilman v. Philadelphia.” This ruling addressed balancing the needs of waterborne and land commerce around bridges. The proposed bridge schedule provides three periods during which the bridge will remain open to navigation and requires that the bridge upon on signal at other times throughout the day.

Several commenters stated that opening the bridge for one hour period does not allow maritime companies and vessel operators’ adequate time to schedule and complete their transits through Three Mile Creek and pass through the bridge. The Coast Guard has changed the proposed rule to require CSX to keep the bridge opened to vessels for 75 minute periods rather than 60 minutes.

Two commenters stated that they have been losing business because of CSX practices. Another commenter estimated that two companies, over a 1 month period, lost up to \$15,000 in one month because of bridge opening delays. This schedule change

should allow vessels with sufficient time to schedule their through the bridge. The bridge will be required to open at all other times on signal.

The Coast Guard has concluded that there is sufficient information to change the regulation which will provide vessels with reasonable time to transit through the bridge and will allow CSX to manage their railroad business needs.

III. Discussion of Proposed Rule

This proposed rule change would require CSX to open the bridge three times each day for 75 continuous minutes to allow vessels to transit through the bridge to and from the Mobile River. And it requires CSX to open the bridge on signal at all other times when there are no trains in the block passing over the bridge.

In promulgating drawbridge regulations the Coast Guard must balance the needs of vessels, land transportation and railroads. The public's right to navigation is paramount to rail transportation but it is not absolute. This right may be diminished to benefit land and rail transportation provided that the reasonable needs of navigation are not impaired. CSX has informed the Coast Guard that it cannot physically expand its yard to accommodate building long trains. Vessel operators and facility operators on Three Mile Creek have informed the Coast Guard that their businesses have been and are impacted when CSX stations and passes trains over the bridge and does not open the bridge on signal. This proposed rule change should provide all entities with the ability to use Three Mile Creek and the CSX drawbridge bridge.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive Orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits

of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still transit the bridge and the bridge will open in case of emergency at any time.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT

section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520.).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule will not result in such

an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321-4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table3-1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal Decision Making Portal at <https://www.regulations.gov>. To do so, go to <https://www.regulations.gov>, type USCG- 2021-0301 in the search box and click "Search." Next, look for this document in

the **Search Results** column, and click on it. Then click on the **Comment** option. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select “Supporting & Related Material” in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the <https://www.regulations.gov> Frequently Asked Questions webpage. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

We accept anonymous comments. Comments we post to <https://www.regulations.gov> will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05-1; DHS Delegation No. 0170.1.

2. In § 117.115 redesignate paragraphs (a) and (b) as paragraphs (b) and (c) and add new paragraph (a) to read as follows:

§ 117.115 Three Mile Creek

(a) The draw of the CSX railroad bridge, mile 0.0., will operate as follows: each day from 6:30 a.m. – 7:45 a.m., 2:30 p.m. – 3:45 p.m. and 10:30 p.m. – 11:45 p.m. the bridge will remain in the open to navigation position. At all other times the draw will open on signal and remain open to clear all vessel queues. CSX will open the draw anytime at the direction of the District Commander.

Dated: May 31, 2022

R.V. Timme,
Rear Admiral, U.S. Coast Guard,
Commander, Eighth Coast Guard District.

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